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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS MEDINA, Defendant and Appellant.	B172380 (Los Angeles County Super. Ct. No. NA057185)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, David E. Madeo, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Carlos Medina appeals from the judgment entered after a jury convicted him of, among other things, second degree robbery. Defendant's first contention on appeal is there was insufficient evidence to support the true finding on a gang enhancement allegation under Penal Code[1] section 186.22, subdivision (b)(1). His second contention is that this matter should be remanded for resentencing because the trial court did not exercise informed discretion when it denied probation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The crimes.*

On the evening of February 27, 2003, Moises Guerrero and his cousin, Alejandro Moreno, drove to Harbor City Park. While parked in a lot, three men on bicycles, including defendant, came up to them. One of them, a 14- or 15-year-old boy, asked Guerrero, "Where you from?" Understanding the question to ask if he was in a gang, Guerrero replied he was not from any gang. Defendant also asked Guerrero, "Where are you from?" Guerrero repeated he was "not from anywhere."

While pointing a gun at Guerrero, defendant then told Guerrero to empty his pockets and to give him the car keys and his car stereo. Defendant started pulling on the car's speaker box to get it out. The boy also told Guerrero to empty his pockets and to give him his wallet and basketball jersey. After briefly fighting with the boy, Guerrero ran to an office in the park and called the police. When Guerrero looked back at his car, the boy was running away with his amplifier. Defendant was searching the car and trying to start it. The third man and defendant told Guerrero's cousin to empty his pockets. Defendant and the third man left with Guerrero's speaker.

The next day, Officer Kevin Gruner saw Ricardo Bojorquez in an alley. When Bojorquez saw Officer Gruner, Bojorquez yelled and ran. Officer Gruner then saw a

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[1] All further undesignated statutory references are to the Penal Code.

hand drop a gun near a brick wall. Defendant was the only person near the gun, as Bojorquez was five feet away. Defendant, who was wearing a baseball cap with the letters "H.C." on it, told Officer Gruner he was a member of the Harbor City gang, and that his moniker is "Shorty." On defendant's left hand is a tattoo that says "H.C."

After defendant was taken to the police station, he ran out while handcuffed. He was caught in the station's parking lot.

At the time of these events, defendant was 17 years old.

B. *Gang evidence.*

Officer Mark Maldonado testified as a gang expert for the People as follows. Harbor City Boys is a Hispanic gang in Harbor City. It has about 150 members. Harbor City Boys has gang signs, for example, they make their hands into a "H" and a "C," and they write "HC" or "255," a reference to a street in Harbor City, on their bodies and in graffiti. The park where the crimes at issue took place is in their turf. Activities such as murder, robbery, and drug sales and use can enhance an individual's and the gang's status. Gang members must be "down" for their gang, meaning they must put in work for the gang by getting money and putting it on the books for fellow gang members in prison, attack rivals, and defend their turf. Many street gang members ask their victims, "Where you from," meaning, "Are you from Harbor City or are you an enemy?"

Luis Ryra, Armando Alvarado, and Samuel Perez, none of whom were alleged to have been involved in the offenses at issue, are convicted Harbor City Boys gang members.

Officer Maldonado met defendant when defendant was 13 or 14 years old, and he has observed defendant's involvement in the gang becoming "heavier and heavier" as defendant got older.

II. Procedural background.

Trial was by jury. The jury found defendant guilty of count 1 for possession of a firearm by a minor (§ 12101, subd. (a)(1)); counts 2 and 3 for second degree robbery (§ 211); and count 4 for escape from arrest (§ 836.6, subd. (b)). The jury also found true

a personal gun use allegation as to counts 2 and 3 (§ 12022.53, subd. (b)) and found true that in the commission and attempted commission of the offenses a principal in the offense was armed with a handgun (§ 12022, subd. (a)(1)). The jury found true that the crimes charged in counts 1, 2, and 3 were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)).

After hearing testimony from a forensic psychologist at defendant's sentencing hearing,[2] the trial court sentenced defendant to a total term of 22 years in state prison, comprised of the low term of 2 years on count 2 plus 10 years for the gang enhancement plus 10 years for the firearm enhancement.[3]

DISCUSSION

I. Sufficient evidence supports the true finding on the gang enhancement allegation.

The jury found true the allegation that the gun possession and robberies (counts 1, 2, and 3) were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist criminal conduct by gang members. Defendant contends there is insufficient evidence to show the offenses were gang related. We do not agree.

Under the substantial evidence standard of review, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must

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[2] That testimony is discussed in greater detail, *post.*

[3] The court also imposed a concurrent sentence of 20 months on count 1 (8 months for the base offense plus 12 months for the gang enhancement) and a concurrent sentence of 12 months on count 4. The court imposed but stayed a sentence on count 3.

accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) The appellate court thus considers whether " ' "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citations.]" (*People v. Gamez* (1991) 235 Cal.App.3d 957, 977, disapproved on another point in *People v. Gardeley* (1996) 14 Cal.4th 605, 624, fn. 10.)

Where there is a gang enhancement alleged, the prosecutor must prove the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1)), and that the defendant's gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol, (2) having as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute, and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity (§ 186.22, subds. (e) & (f)). (*People v. Gardeley, supra,* 14 Cal.4th at pp. 616-617.) To prove a gang enhancement, an expert witness may give opinion testimony "on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth' " so long as the hypothetical question is rooted in facts shown by the evidence. (*Id.* at p. 618; see also *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484-485 & fn. 3.)

In *People v. Gardeley, supra,* 14 Cal.4th 605, the California Supreme Court considered how the prosecution can satisfy its burden of proving the truth of a gang enhancement allegation. In that case, the victims stopped in an area controlled by the Family Crip gang. Defendant, a member of the gang, and two other men approached the

victim, and defendant asked, " 'What are you doing here, white boy?' " (*Id.* at p. 610.) The men then beat the victim and robbed him. (*Id.* at pp. 610-611.) At trial, the People's gang expert testified, among other things, the attack was " 'gang related activity,' " and it was a " 'classic' " example of how a gang uses violence to secure its drug-dealing stronghold." (*Id.* at p. 613.) The court held that the expert opinion testimony, along with percipient witness testimony and documentary evidence of an uncharged crime, satisfied the prosecution's burden of proving the gang enhancement allegation.

The prosecution here similarly presented substantial evidence from which a rational trier of fact could conclude the gang enhancement allegation was true. The People's gang expert testified that Harbor City Boys is a Hispanic gang with about 150 members. The gang's primary activities include robbery. At least three known members of the Harbor City Boys have been convicted of assault. With respect to the specific incident at issue, three men, including defendant, approached the victims. One of the men asked Guerrero, "Where you from?"—a question gang members ask to determine whether someone is friendly or hostile to their gang. Defendant, while armed with a gun, also asked the victim, "Where are you from?" Upon Guerrero's denial of gang membership, defendant and his colleagues robbed him. The People's gang expert was asked, "In your opinion, given the hypothetical I've just given you, three individuals, a robbery, a gun that's involved and the questions that were asked, do you think that would be something that was done in furtherance of or for the benefit of the criminal street gang?" He answered, "Yes."

Based on this evidence, a rational trier of fact could conclude that the robberies and gun use were gang related. Participants in the crime, including defendant, asked if the victim had any gang affiliation. When the victim denied gang membership, defendant robbed him. And robbery, according to the People's gang expert, is a way in which a gang member can further his status in the gang and help fellow gang members. We therefore conclude that there was substantial evidence to support the true finding on the gang enhancement allegation under section 186.22, subdivision (b)(1).

II. **The trial court did not err in denying probation.**

A. *Additional background.*

At defendant's sentencing hearing, the defense called to testify Dr. Haig Kojian, a forensic psychologist at California Department of Corrections whom the court had appointed to conduct an examination for fitness for juvenile court under Welfare and Institutions Code section 707, subdivision (c).

Dr. Kojian wrote an incomplete report regarding defendant's fitness to remain in juvenile court in which he tentatively concluded defendant was unfit for juvenile court. But he also recommended further testing. Further testing showed that defendant suffers from frontal lobe deficiency, meaning he lacks the "executive ability" to organize, to make decisions, and to use abstract thinking. Defendant has an IQ of 67. Having an IQ of below 70 plus deficiencies in adaptive skills results in a diagnosis of mental retardation. Defendant reported severe abuse from his parents, and he thought he was exposed to alcohol in utero. During an interview with Dr. Kojian, defendant choked himself to experience a "high" from oxygen deprivation. Dr. Kojian said that had he been able to conduct the further testing at the outset, defendant might have remained in juvenile court. He concluded that defendant is organically impaired and that had he been unable to care for himself, Dr. Kojian would have pronounced a diagnosis of mental retardation.

After direct and cross-examination of Dr. Kojian concluded, the trial court stated, "This is not a probation case. He's not going to be placed on probation, period. That's not even in the ballpark." The court then asked Dr. Kojian what consideration should be given to defendant. Dr. Kojian responded that defendant was on Ritalin, Trazadene (an anti-depressant), and Depakote (to maintain stability) and repeated that defendant is organically impaired. When the trial court asked if Dr. Kojian was aware defendant completed the 11th grade, Dr. Kojian responded that defendant told him he had been a special education student for nearly three or four years, and as a minor he was required to go to Narbone High School.

B. *The issue has not been waived on appeal.*

We reject the People's initial argument that defendant has waived or forfeited this issue by failing to object below. The trial court conducted a sentencing hearing at which defendant had its witness testify. It is clear that defendant was asking for probation, and it is equally clear the court understood that was the issue because it stated, after hearing Dr. Kojian's testimony, that it would not grant probation. We therefore hold that the issue is properly before us on appeal.

C. *The trial court did not abuse its discretion in denying probation.*

Defendant argues there was substantial evidence he was borderline retarded, had received special education, and was likely to continue to receive special education services while incarcerated. He contends the trial court failed to consider these factors in sentencing "because it was apparently unaware of the impact of [defendant's] special education status" when it denied probation. We do not agree.

Sentencing decisions, including whether to grant or deny probation, are reviewed for an abuse of discretion. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910; *People v. Delson* (1984) 161 Cal.App.3d 56, 62.) A court abuses its discretion "whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.) We will not disturb a trial court's exercise of its broad discretion except upon a showing the trial court "exercised its discretion in an arbitrary or capricious manner." (*People v. Delson, supra,* at p. 62.) "We will not interfere with the trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey, supra,* at p. 910; see also *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) "The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence

will not be set aside on review. [Citations.]" (*People v. Superior Court (Du), supra,* at p. 831.)

Referring to California Rules of Court, rule 4.413(c)(2)(ii) and (iii),[4] defendant argues that had the trial court been properly informed of the impact of defendant's special education status it might have considered that factor in its decision to grant or deny probation. Nothing in this record, however, suggests the court was unaware of its ability to grant probation based on the evidence of defendant's mental capabilities and that he had attended special education classes. The court heard, and clearly considered, Dr. Kojian's detailed testimony. In fact, the court directly questioned Dr. Kojian. In direct response to the court's questioning and comment that defendant had completed the 11th grade, Dr. Kojian stated that defendant told him he had been a special education student. Therefore, the court was aware defendant had, at least at one point in time, special education needs.[5]

Nonetheless, the trial court concluded that probation should be denied. We see no abuse of discretion in that conclusion. Because he used a deadly weapon, a firearm, defendant was presumptively ineligible for probation absent a finding by the court that defendant's case was unusual and the interests of justice would best be served if probation was granted. (§ 1203, subd. (e)(2); *People v. Superior Court (Du), supra,* 5

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[4] California Rules of Court, rule 4.413(c)(2)(ii) and (iii) provide: "(c) The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate: [¶] . . . [¶] (2) A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense including: [¶] . . . [¶] (ii) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation. [¶] (iii) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

[5] To the extent defendant argues the trial court's failure to consider his right to receive a free and appropriate education violated his due process rights, we similarly conclude there was no violation, as the court *did* consider defendant's education status.

Cal.App.4th at pp. 829-830.) The court was clearly unpersuaded that this was such an unusual case. Although Dr. Kojian did testify defendant suffered from frontal lobe deficiencies that caused him to have poor decisionmaking abilities, he also agreed that defendant's actions in connection with the crimes at issue could be an example of frontal lobe activity and decisionmaking. Moreover, Dr. Kojian did not testify defendant is borderline retarded, as defendant asserts. Rather, Dr. Kojian testified that had defendant lacked adaptive skills, he would have diagnosed defendant with mental retardation. In addition, defendant, although 17 at the time of the crimes, had a significant record of prior criminal offenses that included sustained petitions for theft in 1998; for grand theft of person in 1999; and for battery on a person in 2001. Defendant also used a gun and actively participated in the current offenses, both of which are additional factors that support the court's decision to deny probation. (Cal. Rules of Court, rule 4.414(a)(2), (6).)

DISPOSITION

The judgment is affirmed.

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.